UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

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DONALD R. VISSER, ROBERT HOSSFELD, MARIE HOSSFELD, and BEN JOHNSON, individually and as the representatives of a class of similarly situated individuals,

Plaintiffs,

Case No. 1:13-cv-01029-PLM-PJG

HON. PAUL L. MALONEY

-vs-

CARIBBEAN CRUISE LINE, INC., CONSOLIDATED TRAVEL HOLDINGS GROUP, INC., DANIEL LAMBERT and ROBERT P. MITCHELL[1],

Defendants.

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PLAINTIFF'S RESPONSE TO DEFENDANT CARIBBEAN CRUISE LINE, INC.'S MOTION FOR LEAVE TO SUPPLEMENT ITS RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

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[1] Defendant Robert P. Mitchell was dismissed by Court Order (DE 21).

COME NOW Plaintiffs, Donald R. Visser, individually, and as the representative of a class of similarly situated individuals, Robert Hossfeld, Marie Hossfeld, and Ben Johnson by and through counsel, Visser and Associates, PLLC, and state the following in opposition to Defendant's Motion For Leave To Supplement their response to Plaintiff's Motion for Class Certification based on the Supreme Court's decision in *Spokeo, Inc v Robins*, No. 13-1339, 578 U.S. ___, slip op. at 8-11 (2016).

Defendant previously requested, and the Court denied a stay awaiting the Supreme Court's decision in *Spokeo*. (ECF No. 187 PageID.4122.)

When the Court issued its Order denying Defendant's request for a stay, it recognized that even if the Supreme Court answered the question as posited by the Defendant in regards to the Fair Credit Reporting Act claim in *Spokeo*, a decision in *Spokeo* would not decide the TCPA matter before the Court, stating:

> In *Spokeo*, the Supreme Court may decide whether parties have standing to sue when the only injuries alleged are statutory damages for violations of federal law. Here Plaintiffs seek statutory damages under the Telephone Consumer Protection Act and a Michigan Statute. Defendants reason that the Supreme Court may resolve *Spokeo* in a manner that eliminates subject-matter jurisdiction over this case. Plaintiffs contend they have suffered other injuries not created by the statute, such as the cost of the cell phone call and their time. (ECF No. 187 PageID.4122-4123.)

Having already determined that this case is distinguishable from *Spokeo* there is no need to revisit the issue through the submission of additional supplemental briefs.

Defendant has overstated the effects of *Spokeo* on the case at bar. Fundamentally, the Supreme Court's recent opinion in *Spokeo* determined that as to the issue of 'injury-in-fact' requirement of standing "the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization" and as a result "its standing analysis was **incomplete**." *Id.* at 646. (emphasis added). In its preamble, Justice Alito noted that the Ninth-Circuit was so focused on whether the alleged injuries were particularized that the Ninth-Circuit neglected to determine whether the alleged injuries were concrete. *Id.* at 640. As such, the Court did nothing more than uphold the Court's ruling as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992), which requires a plaintiff show that he or she suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical" in order for a plaintiff to have standing. *Id.* at 560. In point of fact, the Supreme Court's decision in *Spokeo* did not answer the question as certified to the Court in the negative or the affirmative, but reaffirmed existing case law which spells out that injuries which confer standing can be tangible or intangible so long as the Court's determination of whether or not plaintiffs have suffered an injury-in-fact considers the elements outlined in *Lujan.*

Indeed, the quote that Defendant uses in Paragraph 6 of its instant Motion as the basis for that Motion acknowledges this fact, but Defendant deliberately omitted a portion of the quote through the use of an ellipsis. (ECF No. 225 PageID.5111-5112.) The full quote is as follows:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III. **See *Summers*, 555 U. S., at 496, 129 S. Ct. 1142, 173 L. Ed. 2d 1 ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation . . . is insufficient to create Article III standing"); see also *Lujan, supra*, at 572, 112 S. Ct. 2130, 119 L. Ed. 2d 351.**

Spokeo, supra, at 645. (emphasis added). Because the Court has not added any substantive revisions to the standard set forth in *Lujan*, there is no need for supplemental briefs in this matter.

Moreover, the Court's holding in *Spokeo* concerned the Fair Credit Reporting Act (FCRA) rather than the Telephonic Consumer Protection Act (TCPA) and Michigan Homes Solicitation Sales Act (MHSSA) at issue in this case. This distinction is important because the Supreme Court's 2015-2016 calendar of cases also included a TCPA case where the Court specifically found that plaintiffs (Gomez and a putative class of similarly situated persons) could pursue a claim for statutory damages under the TCPA for the receipt of an offending text message *even when* the defendant had made an offer of judgment for the entirety of the named plaintiffs' costs as well as treble damages under the TCPA (less attorney fees). *See Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663 (2016).

Other than re-iterating that *Lujan* and its test for standing is still good law, the Supreme Court's opinion in *Spokeo* has no further bearing on the case at bar.

WHEREFORE, Plaintiffs pray that this Court enter an order denying Defendants' Motion for Leave to Supplement its Response in Opposition to Plaintiff's Motion for Class Certification.

Dated: June 6, 2016

/s/ Donovan J. Visser .
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PROOF OF SERVICE

A copy of this document was served upon all parties of record electronically via the Court's ECF system on June 6, 2016.

/s/ Donovan J. Visser .
Donovan J. Visser